Date: 20071121

Docket: A-415-06

Citation: 2007 FCA 370

CORAM: **SEXTON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

CHRISTOPHER M. HENLEY

Respondent

Heard at Toronto, Ontario, on October 24, 2007.

Judgment delivered at Ottawa, Ontario, on November 21, 2007.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: SEXTON J.A.
SHARLOW J.A.

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REASONS FOR JUDGMENT

[1] This is an appeal from a decision of Sheridan J. of the Tax Court of Canada (2006 TCC 347) allowing the appeal of Mr. Christopher M. Henley against a reassessment of his income tax liability for his 2000 taxation year under Part I of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"). Unless otherwise indicated, all statutory references in these reasons are to the corresponding provisions of the ITA for the taxation year under consideration.

[2] In 1997, Canaccord Capital Corporation (“Canaccord”), Mr. Henley’s employer, arranged a financing for Unique Broadband Systems Inc. (“UBS”). As consideration for this service, UBS agreed to pay a cash fee and to issue warrants to purchase 2,970,767 of its common shares to Canaccord. Mr. Henley worked on the deal and, as a result, Canaccord allocated 742,692 of those warrants to him.

[3] In 2000, Mr. Henley instructed Canaccord to exercise all the 742,692 warrants that had been allocated to him and to sell all of the UBS shares that were received as a result of that exercise. Canaccord complied with those instructions and after payment of the warrant exercise price and sales commissions, Mr. Henley was left with $967,480.

[4] The issue in this appeal is the basis upon which Mr. Henley is to be taxed on that amount in his 2000 taxation year. The Crown says that the amount should be taxed as employment income, while Mr. Henley says that the amount should be taxed as a capital gain from the disposition of the UBS shares that were acquired on the exercise of his warrants.

BACKGROUND

[5] The hearing before the Tax Court of Canada proceeded on the basis of an agreed statement of facts.

[6] In his 2000 income tax return, Mr. Henley reported the $967,480 amount as employment income on the basis of the T-4 that had been issued to him by Canaccord and the Minister issued a notice of assessment on that basis.

[7] Mr. Henley objected to this assessment on the basis that the T-4 amount from Canaccord should have been nil and that the amount reported in the T-4 was a capital gain. The Minister confirmed the assessment and Mr. Henley appealed to the Tax Court of Canada.

TAX COURT OF CANADA DECISION

[8] Sheridan J. found that as part of their employment arrangement, Canaccord promised to compensate Mr. Henley for his efforts in the UBS financing by giving him 742,692 of the warrants that were to be issued by UBS, and that on September 28, 1998, the date upon which 2,970,767 warrants were issued to Canaccord by UBS, Canaccord fulfilled its promise. Accordingly, she held that 742,692 of those warrants were received by and became the property of Mr. Henley on September 28, 1998, when those warrants were allocated to him by Canaccord. Sheridan J. then found that the receipt of those warrants by Mr. Henley constituted a benefit received in the course of or by virtue of his employment, within the meaning of paragraph 6(1)(*a*), the amount of which was equal to the value of those warrants when received by him on September 28, 1998.

[9] In reaching this conclusion, Sheridan J. rejected the contention of the Minister that by virtue of the decision of this Court in *Robertson v. Canada (C.A.)*, [1990] 2 F.C. 717, Mr. Henley received a taxable employment benefit in 2000 when the warrants were exercised and the UBS shares were

sold, and not in September of 1998, when the warrants were received by Mr. Henley. While acknowledging that the Tax Court of Canada is bound by decisions of this Court, Sheridan J. concluded that the decision in *Robertson* was dependent upon the particular facts in that case and that the facts before her were sufficiently different from those in *Robertson* to enable her to distinguish that decision.

[10] Sheridan J. went on to find that the value of the employment benefit was an amount equal to one cent per warrant, the difference between the market value of a UBS share on September 28, 1998 ($0.32) and the exercise price of each warrant ($0.31).

[11] Sheridan J. concluded that the net proceeds of $967,480 that were received by Mr. Henley in 2000 from the sale of the UBS common shares that were issued as a result of the exercise of his warrants, did not constitute a benefit of the type contemplated by paragraph 6(1)(*a*). Instead, she concluded that such net proceeds constituted a capital gain realized by Mr. Henley in his 2000 taxation year.

ISSUE

[12] The issue is whether Mr. Henley who received warrants to purchase UBS shares in the course of his employment, received a benefit of the kind contemplated by paragraph 6(1)(*a*) in 1998, the year in which he received those warrants, or in 2000, the year in which he exercised those warrants.

ANALYSIS

Paragraph 6(1)(a) benefit

[13] The determination of the income or loss of a taxpayer from office or employment is dealt with in subdivision a of Division B of Part I of the ITA. Cash compensation is generally required to be included in employment income for the taxation year of receipt under subsection 5(1). Section 7, which is inapplicable in the circumstances under consideration, provides special rules with respect to stock options or rights to acquire shares of an employer corporation. These rules require the inclusion in income of stock option benefits and specify the timing of such income inclusions.

[14] Section 6 provides for the inclusion in employment income of a number of so-called "fringe benefits", often of a non-cash nature. The relevant provision for the purposes of this appeal is paragraph 6(1)(*a*), which reads as follows:

6(1) There shall be included in computing the income of a taxpayer for a taxation year as income from an office or employment such of the following amounts as are applicable	6(1) Sont à inclure dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi, ceux des éléments suivants qui sont applicables :
(*a*) the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment, except any benefit …	*a*) la valeur de la pension, du logement et autres avantages quelconques qu'il a reçus ou dont il a joui au cours de l'année au titre, dans l'occupation ou en vertu d'une charge ou d'un emploi, à l'exception des avantages suivants :
[Emphasis added.]	[Je souligne.]

[15] It is apparent from the underlined words that the scope of this provision is broad. In general terms, the provision requires the inclusion in the income of an employee for a taxation year of the

value of any property that the employee receives in that year from the employer in the course of the employment relationship, except to the extent that any provision of the ITA otherwise provides.

[16] In relation to the circumstances under consideration, the Minister agreed that if Canaccord had transferred a painting to Mr. Henley as compensation for working on the UBS financing, the value of the painting would have been required to be included in computing Mr. Henley's employment income for the taxation year in which the transfer occurred.

[17] "Why then should it be different simply because Canaccord transferred 742,692 warrants to Mr. Henley, rather than a painting?", counsel for the Crown was asked. The answer was that while paragraph 6(1)(*a*) has application to transfers of most types of property by an employer to an employee in the employment context, that provision does not apply where the property in question is a warrant or a right to acquire a share. The Minister argued that this distinction is mandated by the *Robertson* decision. With respect, I do not agree.

[18] In my view, when property of any kind, including warrants or stock options (other than section 7 options or other property covered by specific statutory exclusions, none of which are presently relevant), is received by an employee from an employer in the course of employment, paragraph 6(1)(*a*) will generally mandate the inclusion of the value of that property in the income of the employee for the year of the receipt. Moreover, I believe that *Robertson* is consistent with this statement.

[19] In *Robertson*, Mr. Jack Pierce offered to sell 2,500 shares of Ranger Oil to Mr. J. Stuart Robertson, who managed Mr. Pierce's ranch, in an agreement signed in late 1974. A review of the reasons of Marceau J.A. and of Dubé J. in the lower court decision ([1988] 2 F.C. 144) does not reveal an entirely clear picture of the terms of the offer. Both decisions refer to the conditional or contingent nature of the offer. At page 152 of the lower court decision, Dubé J. states:

> In the instant case, prior to the plaintiff's acquisition of the shares in 1980, his right was always conditional upon the continuation of his employment. In other words, until the plaintiff actually exercised his option in 1980, it could not be ascertained whether that central condition of the agreement would be fulfilled: it is a principle of income recognition that an amount must not be taxed as income until uncertainty about the taxpayer's entitlement to it has been removed. [Emphasis added.]

In paragraph 2 of the decision of this Court, Marceau J.A. also commented upon the conditionality of the offer, as follows:

> The option was to become exercisable at the rate of 500 shares per year, over the next five years, subject to certain conditions, the main condition being that the appellant continue his employment. [Emphasis added.]

[20] In analyzing *Robertson*, the nature of the arrangement between Mr. Pierce and Mr. Robertson must be construed. In my view, Marceau J.A. held that in 1974 Mr. Pierce made a simple offer to sell the Ranger Oil shares to Mr. Robertson at a future time provided that Mr. Robertson continued in Mr. Pierce's employment for a specified period of time. On that basis, Mr. Robertson acquired a conditional or contingent right to those shares at the time that the offer was made. However, only by continuing in his employment with Mr. Pierce until the end of the specified period could this condition or contingency be fulfilled and only upon its fulfillment could Mr. Robertson be said to have acquired an absolute right to accept the offer and to acquire the shares.

Viewed in this light, Mr. Robertson received only an expectation of a benefit at the time of the offer and only upon the fulfillment of the condition or contingency did he become absolutely entitled to a benefit.

[21] To summarize, *Robertson* may be considered to stand for the proposition that where, in the course of an employment relationship, an employee receives a right to acquire property from his or her employer upon the fulfillment of a condition or contingency, the receipt of that right will not constitute a paragraph 6(1)(*a*) benefit to the employee and such a benefit will not arise until the condition or contingency has been fulfilled. By way of example, if an employer gives a painting to an employee as a bonus, there is no doubt that the painting is a benefit, the value of which must be included in income when the painting is received by the employee. By contrast, if the employer offers to give the employee a painting if the employee fulfils a condition, such as concluding a deal or working for a period of time, only upon the fulfillment of that condition can it be said that the employee becomes entitled to the painting and therefore receives a benefit.

[22] In the circumstances under consideration, prior to the completion of the UBS financing, Canaccord had made an offer to make UBS warrants available to Mr. Henley if he worked on that financing. However, that offer was subject to two conditions. First, the financing had to be completed and secondly, the UBS warrants had to have been received by Canaccord. Applying *Robertson*, it can be seen that in May of 1998, when Canaccord agreed that Mr. Henley could obtain 742,692 UBS warrants by working on and concluding the UBS financing, Mr. Henley received only a conditional or contingent right to or in respect of the UBS warrants and therefore did not receive a

paragraph 6(1)(*a*) benefit at that time. At the conclusion of the UBS financing, Mr. Henley had done all that was required of him and therefore one of the conditions or contingencies had been fulfilled. However, at that point, the subject matter of the offer, the UBS warrants, did not exist. That condition or contingency was satisfied on September 28, 1998, when UBS issued the warrant certificate to Canaccord. At that point in time, 742,692 warrants were received by Mr. Henley, as a result of their allocation to him by Canaccord, and their value became a paragraph 6(1)(*a*) benefit to him on that date.

[23] Having determined that Mr. Henley received a paragraph 6(1)(*a*) benefit in 1998, when he received the 742,692 UBS warrants from Canaccord, it follows that Mr. Henley cannot be said to have received a paragraph 6(1)(*a*) benefit in 2000, when those warrants were exercised and the UBS shares received as a result of that exercise were sold. Accordingly, I am in agreement with the conclusion of Sheridan J. on this basis.

Valuation of the Paragraph 6(1)(a) Benefit

[24] The issue in this appeal is whether Mr. Henley received a paragraph 6(1)(*a*) benefit in 2000. Having concluded that he did not, the valuation of the paragraph 6(1)(*a*) benefit that was received by him in 1998 is not a matter that is in issue in this appeal because Mr. Henley's 1998 taxation year is not before us. For that reason, I express no opinion with respect to either the determination of Sheridan J. that the value of a warrant on September 28, 1998 was one cent or the valuation methodology that she employed in making that determination.

CONCLUSION

[25] The allocation of 742,692 UBS warrants by Canaccord to Mr. Henley on September 28, 1998 constituted a benefit received by Mr. Henley, at the time of that allocation, in the course of his employment. The value of that benefit was required to be included in the computation of his employment income for 1998. It follows that Mr. Henley did not receive or enjoy a benefit of the type contemplated by paragraph 6(1)(*a*) as a result of the exercise of his warrants and the sale of the shares that were issued as a consequence of that exercise in 2000.

DISPOSITION

[26] For these reasons, I would dismiss the appeal with costs.

"C. Michael Ryer"
J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-415-06

(APPEAL TO THE FEDERAL COURT OF APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE SHERIDAN OF THE TAX COURT OF CANADA, DATED JULY 27, 2006; RE: ASSESSMENT FOR TAXATION YEAR 2000. TAX COURT NUMBER: 2003-3573(IT)G).

STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. CHRISTOPHER M. HENLEY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 24, 2007
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	SEXTON J.A. SHARLOW J.A.
DATED:	NOVEMBER 21, 2007

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